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No. 90-5744

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER, and PATRICK BRUMM,
Petitioners,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a carrier to which LSD is adhered for ease of delivery constitutes a "mixture or substance containing" LSD within the meaning of the federal sentencing guidelines and 21 U.S.C. § 841(b)(1)(B)(v), so that the weight of the carrier is included in the total weight that determines the guideline sentence and triggers mandatory minimum sentences.

If the first question is answered affirmatively, two constitutional questions are presented:

2. Whether a defendant has a fundamental right to substantive fairness in sentencing, requiring strict scrutiny of a claimed impairment of that right.

3. Whether basing sentences for LSD distribution upon the arbitrary weight of the LSD carrier violates a defendant's right to due process of law.

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 908 F.2d 1312 (7th Cir. 1990).

The memorandum decision and order of the United States District Court for the Western District of Wisconsin (Crabb, J.) has not been reported. It is reproduced in the joint appendix. (J.A. 13)

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was rendered on July 17, 1990, affirming petitioners' judgments of conviction entered on October 20, 1989 and October 24, 1989. Jurisdiction was conferred upon the court of appeals generally by 28

U.S.C. § 1291 and specifically by 18 U.S.C. § 3742, authorizing appeals from sentences imposed after November 1, 1987 which are alleged to violate the law or to misapply the Sentencing Guidelines. The petition for writ of certiorari was filed September 17, 1990. Certiorari was granted December 10, 1990. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1) and Rule 20.1 of the Rules of the Supreme Court of the United States.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

21 U.S.C. § 841 provides in relevant part:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . .
>
> (b) Except as otherwise provided in section 845, 845a, or 845b of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> . . .
>
> (1)(A) In the case of a violation of subsection (a) of this section involving—
>
> . . .
>
> (v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);
>
> . . .
>
> such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . .
>
> (B) In the case of a violation of subsection (a) of this section involving—
>
> . . .

> (v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);
>
> . . .
>
> such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . . .

Amendment V to the United States Constitutior provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A criminal complaint, filed April 20, 1989, charged each petitioner with one count of distributing LSD. (J.A. 3) The affidavit in support of the complaint indicated that petitioner Chapman provided an undercover officer with 1,000 "hits of blotter-type LSD" in exchange for $1,750.00 in recorded currency. (J.A. 6, ¶ 6) The affidavit further indicated that, after petitioner Chapman left the presence of the undercover officer, he joined petitioners Schoenecker and Brumm in a van. (J.A. 7, ¶ 7) Chapman and Schoenecker left the van and drove away in Schoenecker's car. The car was stopped and Chapman and Schoenecker were arrested. Recorded currency totalling $850.00 was recovered from Schoenecker. (J.A. 7, ¶ 8) Brumm was also arrested and was found to be in possession of $900.00 in recorded currency. (J.A. 7-8, ¶¶ 9-10) The complaint indicates that "[t]he LSD weighed approximately 5.7 grams." (J.A. 8, ¶ 10)

An indictment filed May 3, 1989 charged each petitioner with distributing approximately 5 grams of LSD in violation of 21 U.S.C. § 841. (J.A. 9) Each petitioner entered a guilty plea. Prior to sentencing, each petitioner moved the court to declare the five year mandatory minimum sentencing provision of 21 U.S.C. § 841(b)(1)(B)(v), and the Sentencing Guidelines, unconstitutional as applied to LSD distribution, on the ground that the sentencing scheme violated the Fifth Amendment guarantee of due process of law. (R. 102, 104, 106) For the purpose of sentencing and appeal, the government stipulated that the weight of the LSD distributed by petitioners, apart from the weight of the blotter paper, was less than one gram. The government further stipulated that LSD is commonly sold by the dose, or "hit," without regard to the weight of the carrier that contains the dose. (J.A. 12) In a written decision and order, the district court denied petitioners' motions to declare the statute and Sentencing Guidelines unconstitutional. (J.A. 13)

Petitioner Brumm's judgment of conviction was entered October 20, 1989. He was sentenced to the mandatory minimum five year term of imprisonment. (J.A. 18) The judgments of conviction of petitioners Chapman and Schoenecker were entered October 24, 1989. Petitioner Chapman was sentenced to a 96 month prison term. (J.A. 30) Petitioner Schoenecker received a 63 month sentence. (J.A. 24)

Petitioners appealed to the United States Court of Appeals for the Seventh Circuit. After oral argument before a three judge panel, the court, on its own motion, ordered a rehearing *en banc*. By a 6 to 5 vote, the court of appeals affirmed the trial court's ruling. *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990).

Petitioners filed a petition for writ of certiorari with the United States Supreme Court on September 17, 1990. Certiorari was granted December 10, 1990. (J.A. 90)

SUMMARY OF ARGUMENT

In its efforts to punish and deter the distributors of controlled substances, Congress attempted to ensure that federal drug law would focus most intensely on "major traffickers . . . who are responsible for creating and delivering very large quantities of drugs," and managers of retail traffic who sell drugs in "substantial quantities." H.R. Rep. No. 845, 99th Cong., 2d Sess. 11-12 (1986). To that end, Congress made mandatory minimum sentences applicable to persons who distribute large quantities of drugs. Quantities in the legislative scheme are determined by weight. Specific weights of various drugs trigger minimum sentences of five or ten years. 21 U.S.C. §§ 841(b)(1)(A) and 841(b)(1)(B).

Following the lead of Congress, the United States Sentencing Commission promulgated Sentencing Guidelines that progressively increase the severity of sentences imposed for distribution of progressively larger amounts of drugs. *See* United States Sentencing Commission, *Guidelines Manual* § 2D1.1 (1990)[1] (hereinafter *Guidelines Manual*). The evident intent of the sentencing scheme is to visit harsher penalties upon more culpable distributors, measuring culpability by the weight of the drugs distributed.[2]

Congress has generally provided that drug weights include any "mixture or substance containing a detectable

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[1] Because the issues presented in this brief have posed a continuing problem since the promulgation of the Sentencing Guidelines, reference throughout the brief will be made to the current edition of the *Guidelines Manual*. Unless otherwise noted, prior editions do not differ in any way relevant to the issues raised on appeal.

[2] The quantities triggering the mandatory minimum penalties were "based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain." H.R. Rep. No. 845, 99th Cong., 2d Sess. 12 (1986).

amount of" the proscribed drug. 21 U.S.C. §§ 841(b)(1)(A) and 841(b)(1)(B). If, for instance, a quantity of cocaine were mixed with a quantity of mannitol, the weight of the entire mixture would determine the applicability of a minimum sentence.[3]

It makes sense to punish the distribution of greater weights of a drug more severely if the drug is sold by weight. Since a cutting agent, like mannitol, adds to the total weight of the drug, increasing the number of doses that can be distributed, it makes equal sense to base the punishment upon the combined weight of the drug and the cutting agent. However, it makes no sense to follow this formula for punishment mechanistically when the drug is not sold by weight, and when the "mixture or substance containing" the drug does not increase the number of doses available for distribution.

The government stipulated that LSD is sold by the dose, not by weight. (J.A. 12) A dose of pure LSD weighs about 0.05 milligrams. *See* "Typical Weight Per Unit (Dose, Pill, or Capsule) Table," *Guidelines Manual* § 2D1.1, comment. (n.11). Because the dose is so small, LSD is adhered to a carrier (such as a sugar cube, a piece of blotter paper, or a gelatin capsule) before distribution to the consumer. While carriers vary in weight, it is always true that the weight of the LSD is insignificant compared to the weight of the carrier.[4]

A. The first issue raised on appeal is whether an LSD carrier is a "mixture or substance containing" LSD, within the meaning of § 841(b)(1) and the Sentencing Guidelines. If it is, the weight of the carrier effectively determines the sentence. Since carriers vary in weight,

[3] *See, e.g., United States v. Holmes*, 838 F.2d 1175, 1177-78 (11th Cir.), *cert. denied*, 486 U.S. 1058 (1988) (counting entire cocaine mixture for sentencing purposes).

[4] The weight of the LSD is generally less than 1 percent of the weight of the carrier. *United States v. Marshall*, 908 F.2d 1312, 1315-16 (7th Cir. 1990).

including the weight of the carrier for sentencing produces different sentences for different carriers. The differences are extreme. For instance, a distributor with no prior criminal history who sells 100 doses of LSD on sugar cubes would receive a guideline sentence of 188 to 235 months. The same distributor selling the same 100 doses of LSD on blotter paper would receive a guideline sentence of 63 to 78 months. The same distributor selling the same 100 doses of LSD in pure liquid form, without a carrier, would receive a guideline sentence of 10 to 16 months.[5] Scotkin, *The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses*, 26 Crim. L. Bull. 50, 56 n.19 (1990).

Thus, if the carrier is considered a "mixture or substance containing" LSD, the law requires federal judges to impose wildly disparate sentences upon offenders based upon the arbitrary circumstance of the weight or absence of the carrier. There is no moral or legal distinction between selling LSD on blotter paper or selling LSD on sugar cubes. The sugar cube dealer is no more evil than the blotter paper dealer. Selling LSD on a sugar cube neither increases the potency of the drug nor multiplies the quantity of the drug that is available for sale. A dose of LSD is a dose of LSD, regardless of the carrier to which it is adhered. Although the sugar cube dealer and the blotter paper dealer will have committed exactly the same crime, the law as interpreted by the court below forces sentencing judges to ignore the dealers' equal culpability and to base their sentences on an arbitrary factor.

The irrational and unfair results compelled by this interpretation of the law lie at the heart of this appeal. Basing sentences upon the weight of the product sold, when the product is not sold by weight, is nonsensical.

[5] It is ironic that the dealer who distributes pure liquid LSD receives the shortest sentence, for that dealer has probably climbed the highest in the distribution chain.

It could not have been the intent of Congress to make sentences in LSD cases hinge upon an arbitrary factor, particularly when doing so wreaks havoc upon the goal of sentencing uniformity that the Sentencing Guidelines were intended to promote. While the Courts of Appeals that have considered the question have followed what they regarded as the plain meaning of the statute, it is not plain that Congress intended an LSD carrier to be a "mixture or substance containing" LSD, any more than it intended a syringe or a suitcase to be a "substance containing" heroin or a car to be a "substance containing" cocaine found in the glove compartment. Common sense argues against a literal interpretation of the phrase "mixture or substance containing" LSD, as do the rule of lenity, the rule that a statute should be interpreted to avoid unreasonable or absurd results, and the rule that constructions casting doubt on a statute's constitutionality should be avoided.

B. The second issue raised on appeal addresses the constitutional problems caused by allowing markedly different sentences to be imposed upon identically situated offenders based upon the arbitrary weight of an LSD carrier. Due process of law prohibits the government from basing a denial of liberty on an arbitrary factor. Equal protection of the law prohibits the government from treating equally situated offenders differently unless there is a justifiable reason for doing so. Petitioners argue, as a third issue, that their right to be free from an arbitrary deprivation of liberty—their right to be sentenced fairly—is fundamental, and that any infringement of that right must be strictly scrutinized. Even if the court examines the due proces and equal protection claims under a rational basis test, however, the sentencing scheme is unconstitutional as applied to LSD, because there is no rational basis for making the length of a sentence depend upon a factor that has no relationship to culpability or to any other legitimate sentencing consideration. For these reasons, the judgments below

must be reversed and the cases remanded for resentencing.

ARGUMENT

I. THE WORDS "MIXTURE OR SUBSTANCE CONTAINING A DETECTABLE AMOUNT" OF LSD SHOULD BE CONSTRUED TO EXCLUDE THE CARRIER TO WHICH LSD IS ADHERED

A. Because LSD Is Not Sold By Weight, the Weight of the LSD Carrier Should Not Determine a Defendant's Sentence

"In its pure form, LSD tartrate is a water-soluble crystalline material." *United States v. Healy*, 729 F. Supp. 140, 141 (D.D.C. 1990). Pure LSD can also be delivered in a liquid or powdered form. B. Wells, *Psychedelic Drugs* 48 (1974). In its laboratory form, LSD generally comes in 100 microgram ampoules, ready for injection. *Id.* In its street form, LSD is rarely injected. Because an effective dose of LSD is extremely small, it is adhered to a carrier for ease of distribution. Blotter paper,[6] gelatin capsules, and sugar cubes have been most frequently employed as carriers, but anything that will conveniently hold a microscopic drop of liquid—including such substances as candy and animal crackers—will do. *Id.* at 46, 48; Committee Report, *Dependence on LSD and Other Hallucinogenic Drug*, 202 J. A.M.A. 47, 47 (October 2, 1967).

Carrier weights vary enormously. A sugar cube weighs about 2,270 mg. Scotkin, *The Development of the Federal Sentencing Guideline for Drug Trafficking Of-*

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[6] The blotter paper used to transport LSD is generally a thin sheet of paper, perforated into squares. A dose of LSD is adhered to each square. The consumer may either swallow the square of paper, lick the LSD from the paper without ingesting the paper, or insert the paper into a beverage, releasing the drug into the beverage. *United States v. Marshall*, 908 F.2d 1312, 1315 (7th Cir. 1990); *United States v. Elrod*, 898 F.2d 60, 61 (6th Cir. 1990); *United States v. Bishop*, 894 F.2d 981, 983 (8th Cir. 1990).

fenses, 26 Crim. L. Bull. 50, 56 n.19 (1990). A square of blotter paper may weigh about 14 mg.[7] *Id.* A gelatin capsule appears to weigh 2.25 mg.[8] A dose of pure LSD in liquid form weighs 0.05 mg. *Id.*

Both Congress and the Sentencing Commission have linked the severity of sentences for LSD distribution to the weight of the LSD distributed. *See* 21 U.S.C. § 841(b)(1); *Guidelines Manual*, § 2D1.1. Congress has mandated a minimum ten year sentence for the distribution of 10 grams or more of "a mixture or substance containing a detectable amount" of LSD. 21 U.S.C. § 841(b)(1)(A)(v). A minimum five year sentence is required for the distribution of 1 gram or more of "a mixture or substance containing a detectable amount" of LSD. 21 U.S.C. § 841(b)(1)(B)(v).

If the LSD carrier is deemed a "mixture or substance containing" LSD, sales of relatively modest amounts of LSD will trigger mandatory minimum sentences. Moreover, since the weight of the carrier overwhelms the weight of the LSD, sentences will depend almost entirely upon the weight of the carrier. The distributor who

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[7] As drug traffickers do not adhere to quality control standards, the weight of blotter paper varies from dealer to dealer. Petitioners' blotter paper, containing 1,000 doses of LSD, weighed 5.7 grams, or 5.7 mg. per dose. Respondent Marshall's blotter paper, containing 11,751 doses, weighed 113.32 grams, or 9.6 mg. per dose. *Marshall*, 908 F.2d at 1316, n.1. In *United States v. Rose*, 881 F.2d 386, 387 (7th Cir. 1989), 472 doses on blotter paper weighed 7.3 grams (15.4 mg. per dose). In *United States v. Elrod*, 898 F.2d 60, 61 (6th Cir. 1990), 1,990 doses adhered to blotter paper weighed approximately 11 grams (5.5 mg. per dose). Five thousand doses of LSD on blotter paper weighed 44.133 grams, or 8.8 mg. per dose, in *United States v. Healy*, 729 F.Supp. 140, 141 (D.D.C. 1990). Thus, the weight of a single square of blotter paper ranged from 5.5 mg. in *Elrod* to 15.4 mg. in *Rose*.

[8] In *United States v. McGeehan*, 824 F.2d 677, 680 (8th Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988), 1,000 gelatin capsules containing LSD weighed 2.25 grams, or 2.25 mg. per capsule.

uses a heavier carrier will be punished more severely than the distributor who sells the same number of doses (or even fewer) on a lighter carrier. An example of these disparities can be shown in tabular form:

Carrier	Weight of 100 doses [9]	Base offense level	Guideline range (months) [10]
Sugar cube	227 gr.	36	188-235
Blotter paper	1.4 gr.	26	63-78
Gelatin capsules	225 mg.	18	27-33
Liquid LSD (no carrier)	5 mg.	12 [11]	10-16

Thus, for selling the same number of doses of LSD, the sugar cube dealer will receive a sentence approximately 7 times longer than the gelatin capsule dealer's sentence, and 18 times longer than the sentence imposed upon the dealer who uses no carrier at all.

These anomalous results accrue from treating LSD as if it were sold by weight. As the government stipulated in the trial court, LSD is sold by the dose, or "hit," without regard to weight. (J.A. 12) Distributors and consumers use carriers for the sake of convenience. The distributor and consumer contract for the sale of a specific number of doses of LSD at a specific price, without regard to the weight of the carrier to which the doses are adhered. Using a heavier carrier adds no value to the drug. A heavier carrier does not increase the potency of the drug, nor does it increase the number of consumers to whom the drug can be distributed. Since

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[9] Except for gelatin capsules, weights are taken from Scotkin, *supra* at 56 n.19. As Scotkin does not give a weight for gelatin capsules, the weight in *McGeehan*, 824 F.2d at 680 is used.

[10] For comparative purposes, the Guideline range stated here assumes a Criminal History Category I. *See Guidelines Manual* § 5A.

[11] Distribution of any amount less than 50 mg. of LSD qualifies as base offense level 12. *See Guidelines Manual* § 2D1.1(c)(16).

LSD is not sold by weight, it makes no sense for LSD sentences to be dependent upon the weight of the LSD carrier.

The nature of LSD distribution therefore distinguishes an LSD carrier from a "cutting agent," which is mixed with a drug to increase the amount of the drug available for distribution. While Congress undoubtedly intended cutting agents to fall within the definition of a "mixture or substance containing" a drug, Congress could not reasonably have intended the term "mixture or substance" to be given its broadest meaning. "Substance" means "[a]ny particular kind of corporal matter" or a "species of matter of a definite chemical composition." 17 *Oxford English Dictionary* 64 (2d ed. 1989). Thus, read broadly, the weight of *anything* that "contains" LSD—whether a sugar cube, a heavy jar, or a Buick—would be considered for sentencing purposes.

The weights of containers and packaging materials are not considered when determining the weight of the controlled substances they contain. *United States v. Marshall*, 908 F.2d 1312, 1329 (7th Cir. 1990) (Cummings, J., dissenting) ("when illegal drugs are sold in capsules, the weight of the capsule is not included in calculating the total weight of the drugs for charging or sentencing purposes"); *United States v. Luster*, 896 F.2d 1122, 1127 (8th Cir. 1990) (§ 841(b)(1)(A)(iii) includes "the weight of the entire mixture or substance without packaging"); *United States v. Smith*, 840 F.2d 886, 888 (11th Cir.), *cert. denied*, 448 U.S. 859 (1988) (court considered weight of crack cocaine "mixture" but did not include the weight of 60 vials). Similarly, because it is not a cutting agent, the weight of water in crack cocaine is not counted toward the total weight of the crack. *United States v. Chester*, 48 Crim. L. Rep. (BNA) 1175 (D.D.C. 1990).

A vial containing liquid LSD is literally a "substance containing" LSD, but no court has suggested that the

weight of the vial should be included in the total weight for sentencing purposes. A glass of orange juice into which a single dose of LSD has been inserted is a "substance containing" LSD, but it would be absurd to count the weight of either the glass or the orange juice in determining a sentence. Judge Posner recognized the absurdity in dissent:

> [I]f Marshall were not a dealer at all but dropped a square of blotter paper into glass of orange juice and sold it to a friend at cost (perhaps 35 cents), he would be subject to the ten-year minimum. The juice with LSD dissolved in it would be the statutory mixture or substance containing a detectable amount of the illegal drug and it would weigh more than ten grams (one ounce is about 35 grams, and the orange juice in a glass of orange juice weighs several ounces). So a person who sold one dose of LSD might be subject to the ten-year mandatory minimum while a dealer who sold 199,999 doses in pure form would be subject only to the five-year minimum.

Marshall, 908 F.2d at 1332-33 (Posner, J., dissenting). Judge Posner's hypothetical suffices to demonstrate the absurdity of construing the phrase "mixture or substance" in a broad, literal manner.

The majority opinion below recognized that the phrase "mixture or substance containing" LSD cannot include all LSD carriers. The court noted that a gram of LSD in a heavy bottle is still just a gram of LSD. The court suggested that some "mingling of the drug with something else" is necessary to transform the carrier into a "mixture or substance." *Marshall*, 908 F.2d at 1317. Yet the concept of "mingling" does not appear in the dictionary definition of "substance," and LSD adhered to a carrier does not satisfy the definition of "mixture" because LSD is not "mixed" or diffused evenly throughout the carrier.[12] The majority correctly understood that the words

[12] "LSD, however, is sold to the consumer by the dose; it is not cut, diluted, or mixed with something else." *Marshall*, 908 F.2d at 1331 (Posner, J., dissenting).

"mixture or substance" cannot be read broadly, that all carriers do not fall within the scope of that phrase. The majority erred, however, in deciding, without further analysis of the *purpose* of the phrase "mixture or substance," to "adhere to the unanimous conclusion of the other courts of appeals that blotter paper treated with LSD is a 'mixture or substance containing a detectable quantity of' LSD." *Marshall*, 908 F.2d at 1318.

B. Decisions of the Courts of Appeals Have Followed a Mistaken View of the "Plain Meaning" of the Words "Mixture or Substance"

The other courts of appeals, unlike the court below, have failed to recognize that not all carriers can be included in the phrase "mixture or substance," and have therefore failed to analyze the ambiguity present in that phrase. Because a Buick, or even a bottle, was obviously not within the meaning of "mixture or substance containing" LSD intended by Congress, the scope of the phrase is unclear.

Despite the absurdity of giving a broad reading to the phrase "mixture or substance containing" LSD, the disturbing trend in the lower courts has been to do just that. Several courts have held that the words "mixture or substance containing" LSD are unambiguous and must therefore be given their "plain meaning."[13] *United States v. Elrod*, 898 F.2d 60, 62 (6th Cir. 1990) (*per curiam*); *United States v. Taylor*, 868 F.2d 125, 127-28 (5th Cir. 1989); *United States v. Bishop*, 894 F.2d 981, 985 (8th Cir. 1990);[14] *United States v. Larsen*, 904 F.2d 562, 563 (10th Cir. 1990).

[13] A Seventh Circuit case, predating *Marshall*, also held that an LSD carrier fell within the plain meaning of the phrase "mixture or substance," although that issue had been neither raised nor briefed by the defendant. *United States v. Rose*, 881 F.2d 386 (7th Cir. 1989). Judge Posner, the author of *Rose*, dissenting in *Marshall*, indicated that he had changed his mind about the wisdom of that conclusion. He has come to believe that an LSD carrier should be treated as packaging material rather than a "mixture or substance" containing LSD. *Marshall*, 908 F.2d at 1335 (Posner, J., dissenting).

The same conclusion was drawn, albeit reluctantly, in *United States v. Daly*, 883 F.2d 313, 318 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 2622 (1990) (concluding that the statute must be followed "to the letter" because it is "clear on its face"). *Daly* recognized that "the use of 'mixture or substance' quantities as the benchmark for determining base offense levels under the Guidelines sometimes produces striking disparities in sentencing—at least where the drug is LSD." *Daly*, 883 F.2d at 316. Remaining faithful to the "plain language" of the statute and of the Guidelines has forced courts "to ignore the possibility that manifestly aberrational and largely circumstantial disparities in sentencing will result." *Id.* at 317.

The *Daly* court found two arguments in favor of a literal interpretation of the statute persuasive. First, the court noted that Congress distinguished between pure phencyclidine (PCP) and a mixture or substance containing a detectable amount of PCP. A ten year minimum sentence applies to the distribution of one hundred grams of PCP, or of one kilogram of a mixture or substance containing a detectable amount of PCP. 21 U.S.C. § 841(b)(1)(A)(iv). Since the same two-part penalty structure is not imposed with regard to LSD, the court concluded that Congress intended that enhanced penalties be determined by the weight of the mixture or substance containing LSD, not by the weight of the LSD itself. *Id.* at 317-18. *Accord*, *Marshall*, 908 F.2d at 1317; *Elrod*, 898 F.2d at 62.

A more compelling explanation for the differing treatment of LSD and PCP, given the absurd results that follow from basing punishments on the arbitrary weight of

[14] *Bishop* is followed without further analysis in *United States v. Ruklick*, 919 F.2d 95 (8th Cir. 1990) and *United States v. Follett*, 905 F.2d 195 (8th Cir. 1990).

the carrier chosen to hold the LSD, "is that Congress simply did not realize how LSD is sold." *Marshall*, 908 F.2d at 1333 (Posner, J., dissenting). The failure of Congress to differentiate between LSD without a carrier and LSD adhered to a carrier—i.e., the failure to create a rational sentencing structure, as it did with PCP—is strong evidence that Congress inadvertently treated LSD as if it were sold by weight. Certainly, the fact that Congress failed to enact rational legislation with regard to LSD, when it did so with regard to PCP, is no proof that Congress *intended* to be arbitrary.

The second argument relied upon by the *Daly* court is the mistaken notion that blotter paper serves the same function as "cutting agents" used with other drugs. Because blotter paper can be ingested with the drug, the court reasoned, it is the same as any other dilutant, and its weight should be counted for the purpose of sentencing. *Daly*, 883 F.2d at 318. *Accord*, *Bishop*, 894 F.2d at 985.

Courts relying on this argument misperceive the purpose of a cutting agent. Cutting agents serve to multiply the number of doses of a drug that can be distributed. Take, for instance, a cocaine distributor who sells cocaine by the gram. He has twenty grams of cocaine available for distribution. By cutting (i.e., mixing) the cocaine with an equal weight of mannitol, the distributor can double the number of doses available for sale. By diluting the product, the distributor increases the supply of the drug, and correspondingly increases both his profits and the social harm he causes.

Such is not the case with LSD, because LSD is sold by the dose, not by the weight of the product. A dose consists of a fixed amount of LSD. A distributor who has enough LSD to sell 20 doses will sell no more than 20 doses. He may sell them on any of a variety of carriers, but he will do so by placing one dose on each carrier.

The carrier neither dilutes the LSD [15] nor increases the number of doses available to market. The carrier simply facilitates convenient drug delivery. While *Daly* found it significant that an LSD carrier can be ingested with the drug, as can a cutting agent or dilutant, the ingestability of a substance does not transform it into a cutting agent, because ingestibility does not increase the number of doses that can be marketed. As Judge Posner pointed out in dissent:

> The consumer drops the cube or the piece of paper into a glass of water, or orange juice, or some other beverage, causing the LSD to dissolve in the beverage, which is then drunk. This is not dilution. It is still one dose that is being imbibed. . . . [A] pint of orange juice containing one dose of LSD is not more, in any relevant sense, than a quart of juice containing the same one dose, and it would be loony to punish the purveyor of the quart more heavily than the purveyor of the pint. It would be like basing the punishment for selling cocaine on the combined weight of the cocaine and of the vehicle (plane, boat, automobile, or whatever) used to transport it or the syringe used to inject it or the pipe used to smoke it. The blotter paper, sugar cubes, etc. are the vehicles for conveying LSD to the consumer.

Marshall, 908 F.2d at 1332 (Posner, J., dissenting).

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[15] LSD constitutes less than 1 percent of the total weight of blotter paper impregnated with LSD. The majority below observed that this "dilution rate" may not be unusual for street drugs. *Marshall*, 908 F.2d at 1316. The court's observation is meaningless, because LSD carriers do not "dilute" LSD. A person who buys a dose of LSD will receive the same quantity of the same potency, and will achieve the same result by ingesting the drug, whether the dose is sold on blotter paper, a sugar cube, a gelatin capsule, or as liquid in a syringe. LSD cannot be meaningfully compared to drugs that are diluted by mixing them with inert substances in order to increase the volume, and hence the weight, of the product to be sold.

C. The Words "Mixture or Substance Containing" LSD Are Ambiguous

One court has agreed that the phrase "mixture or substance containing" LSD should be read to exclude the LSD carrier. *United States v. Healy*, 729 F. Supp. 140 (D.D.C. 1990). Rejecting a broad definition of "substance," the court held that blotter paper soaked in LSD does not fall within the ordinary concept of "a kind or species of matter." *Id.* at 142. Noting that the definition of "mixture" requires two substances to be put together so that the particles of one are evenly diffused among the particles of the other, the court concluded that LSD is not diffused through the blotter paper that holds it, and thus is not a "mixture." *Id.* After finding that excluding a carrier from the "mixture or substance containing" LSD would promote sentencing uniformity and avoid sentences that are disproportionate to the offense, the court concluded that the weight of the carrier should not be included in the sentencing determination. *Id.* at 143-44.

Some members of Congress agree that the use of the phrase "mixture or substance containing a detectable amount of LSD" was less than precise. Senator Biden introduced a "technical amendment" to respond to the inequity that the Senator perceived in subjecting a person who distributes 1,000 doses of LSD in liquid form "to no minimum penalty, while a person handing another person a single dose on a sugar cube is subject to the mandatory five year penalty." 135 Cong. Rec. S 12748 (daily ed. Oct. 5, 1989) (Senator Biden's Supplementary Analysis of Amendment No. 976). The amendment would have remedied the inequity "by removing the weight of the carrier from the calculation of the weight of the mixture or substance." *Id.*[16] A similar amendment, providing that the weight of a "mixture or substance" under section 841(b)(1) "shall not include the

[16] The amendment was withdrawn before Congress had an opportunity to act on it.

weight of the carrier upon which the controlled substance is placed or by which it is transported" has been introduced by Senator Kennedy. 136 Cong. Rec. S 7069 (daily ed. May 24, 1990). The proposed legislation, while not necessarily proof of Congressional intent at the time of the original enactment, establishes that the phrase "mixture or substance" is unclear in its application to LSD.

The Sentencing Commission has acknowledged the ambiguity in the phrase "mixture or substance containing" LSD. While the Guidelines have adopted the "mixture or substance" language, *Guidelines Manual* § 2D1.1, the Guidelines do not indicate whether an LSD carrier is a mixture or substance containing LSD. The Commission, recognizing that bizarre results follow from linking sentences to the weight of the LSD carrier, solicited public comment on the issue.[17] In a letter to Senator Biden, William Wilkins, Jr., the Commission Chairman, stated that the Commission believed the Guidelines should be interpreted consistently with the Controlled Substances Act to avoid "a definition at variance with what the courts determine to be applicable for purposes of statutory minimum sentences."[18] Recognizing the ambiguity in the statutory language, as well as the sentencing disparities caused by making sentences depend upon the nature of the carrier,[19] Chairman Wilkins stated:

[17] [I]f the carrier was weighed as part of the mixture, a person selling 100 doses of LSD would have an offense level of 32, or 26, or 12 depending on whether the LSD was on a sugar cube, blotter paper, or in a liquid form.

The Commission seeks comment on the most appropriate response to this situation (i.e., should or should not the Commission amend the guidelines to exclude the weight of the "carrier" in LSD cases for guideline purposes?).

54 Fed. Reg. 9136 (March 3, 1989).

[18] Letter from Commission Chairman William W. Wilkins, Jr., to Senator Joseph R. Biden, Jr. at 1 (April 26, 1989).

[19] *Id.* at 2.

> With respect to LSD, it is unclear whether Congress intended the carrier to be considered as a packaging material, or since it is commonly consumed along with the illicit drug, as a dilutant ingredient in the drug mixture (similar to the manner in which granular sugar used to "cut" heroin is considered part of a heroin mixture). The Commission suggests that Congress may wish to further consider the LSD carrier issue in order to clarify legislative intent as to whether the weight of the carrier should or should not be considered in determining the quantity of LSD mixture for punishment purposes.[20]

Not knowing how the words "mixture or substance" would eventually be interpreted, the Commission adopted an amendment stating that "'Mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841."[21] The Commission also indicated that it would raise the issue in its required report to Congress.[22] The Commission has not, however, taken a position as to whether the weight of the carrier should determine the sentence under the Guidelines.[23] *Marshall*, 908 F.2d at 1327 n.2 (Cummings, J., dissenting).

Determining and giving effect to Congressional intent is the first goal of statutory construction. *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123

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[20] *Id.* The letter is quoted in large part in *Daly*, 883 F.2d at 316-17.

[21] Scotkin, *The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses*, 26 Crim. L. Bull. 50, 56 n.19 (1990), *quoting* U.S. Sentencing Commission, *Guidelines Manual* Appendix C, amendment 123, amending § 2D1.1, Commentary, Application Note 1 (Nov. 1, 1989).

[22] *Id.*

[23] A Sentencing Commission Publication, "Questions Most Frequently Asked About the Sentencing Guidelines," dated November 30, 1988, "states that the Commission has not taken a position on whether the blotter paper should be weighed." *Marshall*, 908 F.2d at 1327 (Cummings, J., dissenting).

(1987). It is difficult to imagine that Congress intended to cause the unfair sentencing disparities that follow from a broad interpretation of "mixture or substance." The "plain meaning" of the words is not as obvious as the Courts of Appeals have suggested.[24] The clarifying amendments introduced by Senators Biden and Kennedy, as well as the comments of the Sentencing Commission, demonstrate that the meaning of "mixture or substance" intended by Congress is far from plain. The mere recognition by the majority below that the words "mixture or substance" cannot be read literally to include all "substances" (such as vials or vehicles) containing LSD establishes that the phrase is ambiguous. The court in *Healy* and the five dissenters in *Marshall* gave the words "mixture or substance containing a detectable amount of LSD" a reasonable construction, one that is consistent with the purpose of the enhanced penalties and with the goal of sentencing uniformity.[25]

D. The Legislative History Demonstrates that the Words "Mixture or Substance Containing" LSD Should Be Read to Exclude the LSD Carrier

Unfortunately, the history of section 841 provides no specific answer to the meaning of "mixture or substance." The history contains no reference to the phrase "substance or mixture" in the context of an LSD car-

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[24] A lockstep approach to the plain meaning rule is unwarranted. The primary aim of a court should be to give effect to Congressional intent, not to enforce "plain meanings" that a rational Congress could not possibly have intended. *See California Federal Savings & Loan Asso. v. Guerra*, 479 U.S. 272, 284 (1987) (construction must follow the spirit, not the letter, of the law if a literal construction is not within the legislature's intent); *Watt v. Alaska*, 451 U.S. 259, 266 (1981) (plain meaning rule is "rather an axiom of experience than a rule of law," and does not preclude the consideration of a statute's purpose, regardless of its literal language).

[25] This interpretation does not render the words "mixture or substance" meaningless in the context of LSD. LSD is sometimes mixed with other drugs, including amphetamines. The total weight of such mixture would be relevant for sentencing.

rier. Nonetheless, the history of section 841 does shed some light on Congressional intent.

1. *Comprehensive Drug Abuse Prevention and Control Act of 1970*

Section 841 was originally enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236. The Act divided drugs by schedules, according to potential for abuse. LSD was listed in schedule I(c). That schedule listed "any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances," including LSD. Pub. L. No. 91-513, § 202 (c). Penalties for posesssion and distribution of controlled substances depended upon whether the drug was classified as narcotic or non-narcotic. *Id.*, § 401(b)(1). Since the law did not link penalties to the quantity of the drug possessed or distributed, Congress had no particular need to consider whether an LSD carrier was a "material, compound, mixture, or preparation," and it does not appear to have done so.

2. *Controlled Substances Penalties Amendments Act of 1984*

Punishments were first made dependent upon the quantity of the controlled substance possessed or distributed in the Controlled Substances Penalties Amendments Act of 1984, a chapter of the Comprehensive Crime Control Act of 1984. Pub. L. No. 98-473, 98 Stats. 2068. The law amended § 841(b)(1) by increasing the maximum sentence for possession of 5 grams or more of LSD to 20 years. *Id.*, § 502. Although the amendment referred to "a mixture or substance containing a detectable amount of a narcotic drug" in 21 U.S.C. § 841(b)(1)(A)(i), corresponding use of the phrase "mixture or substance" did not appear in section 841(b)(1)(A)(iv) penalizing possession of LSD.

The 1984 amendments were intended to eliminate inconsistent penalties for major drug offenses and "to

provide a more rational penalty structure for the major drug trafficking offenses punishable under the Comprehensive Drug Abuse Prevention and Control Act of 1970." S. Rep. No. 225, 98th Cong., 1st Sess. 255 (1983). The amendments were designed to eliminate sentencing disparities, particularly those caused by classifying drugs as narcotic and non-narcotic. *Id.* at 256. While noting that the relative dangerousness of a drug should have a bearing on the sentence imposed for its possession or distribution, the legislature determined that "another important factor is the amount of the drug involved." *Id.* at 255.

Thus, the Controlled Substances Penalties Amendments Act of 1984 made quantity (5 grams) the trigger for enhanced penalties for possession of LSD. The Senate Committee report of a predecessor bill to the Act stated that the new enhanced penalties for large scale dealers were triggered by quantities of cocaine, PCP and LSD in an amount "approximately equal to 100,000 times the average user dosage." S. Rep. No. 307, 97th Cong., 1st Sess. 868 (1981). Five grams of LSD approximates 100,000 times the average user dosage only if the carrier is *not* included in the total weight of the drug.

Here, the petitioners possessed 5.7 grams of LSD, counting the weight of the blotter paper, but that weight represented only 1,000 doses. Accordingly, there is strong evidence that Congress, in choosing triggering weights for enhanced penalties for LSD possession, did not intend to count the weight of the carrier.

3. *Anti-Drug Abuse Act of 1986*

The current penalty structure for LSD possession and distribution originated in the Anti-Drug Abuse Act of 1986, Pub.L. 99-570, 100 Stat. 3207 (1986). By creating mandatory minimum sentences for possession of specified quantities of controlled substances, Congress adopted a "market-oriented" approach to sentencing, one that based sentences on the amount of a drug "that might be con-

trolled or directed by a trafficker in a high place in the processing and distribution chain." H.R. Rep. No. 845, 99th Cong., 2d Sess. 12 (1986). The House Committee Report explained the priorities that Congress intended to set with the new amendments:

> The Committee strongly believes that the Federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs. . . . [A] second level of focus ought to be on the managers of the retail level traffic, the person who is filling the bags of heroin, packaging crack into vials or wrapping PCP in aluminum foil, and doing so in substantial street quantities.

Id. at 11-12. The legislation attacked "major traffickers" by imposing a 10 year minimum sentence for possession of certain quantities of controlled substances, and punished retail level traffickers who deal in "substantial street quantities" by imposing a 5 year minimum sentence for possession of certain lesser quantities of controlled substances.

While the 1984 legislation enhanced penalties for possession of 5 grams or more of LSD (representing approximately 100,000 doses), the 1986 amendments enhanced penalties of the possession of a "mixture or substance containing" 1 gram or more of LSD. There is nothing in the legislative history to suggest that by adding the phrase "mixture or substance," Congress intended to impose enhanced penalties upon low level dealers, particularly those who reach the 1 gram threshhold with a relatively few doses adhered to a relatively heavy carrier.[26]

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[26] The only reference to LSD in the debates surrounding the Act did not address quantities or weights of drugs or the use of LSD carriers. (J.A. 65, Cummings, J., dissenting).

Using the ratio of 5 grams equalling 100,000 doses established in the history of earlier legislation, Congress probably intended to trigger the five year minimum sentence at approximately 20,000 doses of LSD. Reading the 1986 House Report together with the 1981 Senate Report leads to the conclusion that Congress defined the "substantial street quantities" of LSD that would trigger the enhanced penalty to be about 20,000 doses.[27] "The enhanced sentencing provisions of § 841 were not intended to reach a distributor of 1,000 or even 5,000 dosage units of LSD." *United States v. McGeehan*, 824 F.2d 677, 681 (8th Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988). Accordingly, Congress could not have intended to count the weight of the carrier in the total weight triggering an enhanced penalty.

E. Excluding the Weight of the LSD Carrier In Determining a Sentence is Consistent With the Goals of the Federal Criminal Code

1. *21 U.S.C. § 841(b)(1)*

Statutes should be construed to give effect to the purpose of the legislation. *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123 (1987). The penalty enhancements in 21 U.S.C. § 841(b)(1) are designed to punish dealers of substantial quantities of drugs more harshly than low-level retailers. Counting the weight of an LSD carrier when imposing a sentence does not effectuate that purpose. Enhancing the punishment of a person who possesses a few doses of LSD on a relatively heavy carrier, such as a sugar cube, or a retailer who possesses 200 doses on blotter paper, is not what Congress envisioned. Enhancing the punishment of those persons while failing to enhance the punishment of a dealer who

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[27] The 20,000 dose triggering weight is consistent with the number of doses of heroin and cocaine that trigger the 5 year minimum sentence under 21 U.S.C. § 841(b)(1)(A). *See Marshall*, 908 F.2d at 1335 (Posner, J., dissenting).

posseses 19,999 doses in liquid form, weighing slightly less than a grain, would contravene the purpose of the enhanced penalty structure. Counting the weight of the carrier when determining a sentence is wholly inconsistent with any rational purpose that Congress could have had.

2. *Sentencing Reform Act of 1984*

The Comprehensive Crime Control Act of 1984, which encompassed the Controlled Substances Penalties Amendment Act of 1984, also produced the Sentencing Reform Act of 1984. The Sentencing Reform Act mandated creation of the Sentencing Guidelines. Congressional intent with regard to the Sentencing Reform Act is therefore relevant to an understanding of the enhanced penalties for drug possession.

The Sentencing Reform Act was designed to "make criminal sentencing fairer and more certain." S. Rep. No. 225, 98th Cong., 1st Sess. 65 (1983).

> The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform. Correcting our arbitrary and capricious method of sentencing will not be a panacea for all of the problems which confront the administration of criminal justice, but it will constitute a significant step forward.

Id. Accordingly, Congress directed sentencing courts to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

Congress created the Sentencing Commission to alleviate the problem of disparate sentences. 28 U.S.C. § 991(b)(1)(B). The Sentencing Commission viewed its mandate as creating "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." *Guidelines Manual*, § 1A3 (policy statement).

Including the weight of an LSD carrier for sentencing does violence to the concept of fair and uniform sentencing. Identically situated offenders who commit identical acts—delivery of the same number of identical doses of LSD—must be given extremely different sentences based on the arbitrary weight of the LSD carrier, if they happen to choose different carriers. If the offenders have caused the same social harm, and if they have the same criminal histories, they should, to meet the purpose of the Sentencing Reform Act, receive sentences within the same narrow guideline range. Yet judges are forced to sentence them differently if the arbitrary weights of the LSD carriers are included in the sentencing computation. It is unreasonable to think that Congress intended to promote uniform sentencing practices through the Sentencing Reform Act, while intending to subject identically situated LSD defendants to widely varying sentences based upon an arbitrary factor that bears no relevance to culpability.

F. Excluding the Weight of the LSD Carrier in Determining a Sentence is Consistent With the Principles of Statutory Construction

Three principles of statutory construction support the exclusion of an LSD carrier from the "mixture or substance containing" LSD. First, ambiguity in the application of a criminal statute should be resolved in favor of the defendant. *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Ladner v. United States*, 358 U.S. 169, 177-78 (1958). The rule of lenity applies not just to the elements of a crime, but to any ambiguity regarding the prescribed punishment. H.F. Way, *Criminal Justice and the American Constitution* 22 (1980), *citing Bell v. United States*, 349 U.S. 81, 83 (1955). Given the uncertainty that inheres in attributing to Congress a desire to enact a statute that imposes irrational punishment, the rule of lenity must apply here.

Second, statutes should be construed "to avoid untenable distinctions and unreasonable results whenever possible." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). Statutes should also be interpreted to avoid absurd, or even "odd," results. *Public Citizen v. U.S. Dept. of Justice*, —— U.S. ——, 109 S.Ct. 2558, 2566, 105 L.Ed.2d 377, 392 (1989); *Sheridan v. United States*, 478 U.S. 392, 402 n.7 (1988). Courts should not assume that Congress intended legislation to produce incongruous results. *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 412-13 (1932). It is absurd to subject equally culpable offenders to grossly disparate sentences based upon the arbitrary weight, or the absence, of an LSD carrier. Making punishments depend upon the weight of a drug carrier when the drug is not sold by weight leads to bizarre results that Congress could not have intended, and a construction that does so must be rejected.

Finally, constructions that cast doubt upon a statute's constitutionality should be avoided. *Public Citizen*, —— U.S. at ——, 109 S.Ct. at 2572, 105 L.Ed.2d at 399. As the following section of this brief demonstrates, construing the phrase "mixture or substance" to include LSD carriers would violate a defendant's Fifth Amendment right to due process of law, and the included right to equal protection of the law. To avoid declaring the penalty structure of 21 U.S.C. § 841(b)(1) unconstitutional as applied to LSD cases, the Court should hold that LSD carriers do not fall within the scope of the phrase "mixture or substance."

II. A SENTENCING SCHEME THAT REQUIRES SENTENCES TO BE BASED UPON AN ARBITRARY FACTOR VIOLATES THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AND TO EQUAL PROTECTION OF THE LAW

A. The Impairment of a Criminal Defendant's Fundamental Right to be Sentenced Fairly Must be Strictly Scrutinized

Section II.B. of this brief argues that petitioners' right to due process of law, and their correlative right to equal protection of the law, was violated by setting the lengths of their sentences according to an arbitrary factor: the weight of the LSD carrier. Central to that argument is the standard by which the constitutional claim will be reviewed. In the case of economic or social legislation, a claim that a law yields arbitrary results, or that it imposes arbitrary classifications, is ordinarily reviewed to determine whether there is a rational basis for believing that the distinction challenged as arbitrary furthers a legitimate governmental interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). When the challenged distinction has an impact upon the exercise of fundamental rights, however, the legislation must be strictly scrutinized, and will survive only if the government has a substantial and compelling interest in the classification. *See, e.g., Kramer v. Union Free School District*, 395 U.S. 621 (1969) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel).

Thus, a question that must be answered before embarking on a constitutional analysis of the federal sentencing scheme as applied to LSD distribution is whether the claimed right—the right to be free from arbitrary deprivations of liberty—is fundamental. The right to liberty itself is undeniably fundamental. M. Forkosch, *Constitutional Law* § 335 at 338 (2d ed. 1969). A criminal defendant's interest in his or her liberty is of "transcending value." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

By logical extension, the right to be free from arbitrary deprivations of liberty—stated differently, the right to be sentenced fairly—must be deemed fundamental. Certainly, the right to fair treatment when the government determines the length of a sentence would be regarded by most individuals as no less fundamental than the right to travel. Freedom from imprisonment for a length of time determined by an arbitrary factor—whether the weight of an LSD carrier or the color of one's hair—must be regarded as one "of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *In re Kemmler*, 136 U.S. 436, 448 (1890).

Commentators have regarded the general right to "fairness in the criminal justice system as a fundamental right to each individual." 2 R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law: Substance and Procedure* § 18.41 at 700 (1986) (hereinafter *Treatise on Constitutional Law*). Professor Gunther discerns a fundamental right to the "fair administration of justice" from a number of Supreme Court rulings that guarantee fair treatment in the criminal justice process.[28] G. Gunther, *Individual Rights in Constitutional Law* 407 (2d ed. 1976).

Sentencing is undeniably an important aspect of the criminal justice process. It is a critical stage at which the right to be represented by counsel obtains. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). The broad right to fair and equal treatment in all stages of the

[28] *Jackson v. Indiana*, 406 U.S. 715 (1972) (invalidating distinction between pretrial commitment of incompetent criminal defendants and incompetent noncriminal detainees); *Williams v. Illinois*, 399 U.S. 235 (1970) (holding unconstitutional imprisonment for failure to pay a fine to extent that length of imprisonment exceeds maximum sentence for crime); *Douglas v. California*, 372 U.S. 353 (1963) (constitutional right to appointed counsel on appeal); *Griffin v. Illinois*, 351 U.S. 12 (1956) (indigent defendant entitled to free transcript when pursuing appeal).

criminal justice system, exemplified by the host of protections guaranteed to the criminal defendant, must certainly include the fundamental right to fair treatment in sentencing. *Treatise on Constitutional Law, supra*, § 18.41 at 703.

The right to be treated fairly at sentencing—the right to have a 20 year sentence rather than a 10 month sentence depend upon something more meaningful than the weight or absence of the carrier on which LSD is conveyed—is as fundamental as any, such as the right to counsel, that is designed to assure a fair result in the criminal courts. It cannot be impaired simply because a rational basis might be imagined for doing so. *See Marshall v. United States*, 414 U.S. 417, 432-33 (1974) (Marshall, J., dissenting) (legislative classification resulting in imprisonment should not be examined under the minimal standard of rationality appropriate to economic regulation, because such a case "does not involve discrimination against business interests more than powerful enough to protect themselves in the legislative halls, but the very life and health of a man caught up in the spiraling web of addiction and crime.").

The Court of Appeals appears to have relied on the Supreme Court's decision in *Marshall* for the proposition that its scrutiny of the constitutional challenge in this case should be conducted "under the highly deferential rational basis test." 908 F.2d at 1322. In *Marshall*, the Supreme Court discussed a lower court holding that there is no fundamental right to rehabilitation from narcotics addiction at public expense after conviction of a crime. The petitioner did not challenge the standard applied by the Court of Appeals and the Supreme Court did not decide the broader question of whether the right to be sentenced fairly is fundamental. 414 U.S. at 422. A holding that there is no fundamental right to drug rehabilitation at public expense offers scant support for rejecting the fundamental right to be sentenced fairly.

Thus, in deciding whether the petitioners' right to due process and equal protection of the law was violated by the challenged sentencing scheme, it is not enough to determine whether a rational basis for the scheme might be imagined. The right to be sentenced fairly is fundamental, and a legislative scheme that impairs that right can survive only if it is justified by a compelling and substantial governmental interest.

The government has no compelling interest in sentencing defendants based on the weight of the carrier to which LSD is adhered. Indeed, as Judge Posner noted, the government in the court below was unable to discern any reason for sentencing a defendant who uses a heavy carrier more harshly than a defendant who uses a lighter carrier. *Marshall*, 908 F.2d at 1333 (Posner, J., dissenting). The sentencing scheme does not survive strict scrutiny. In fact, as the following sections of this brief demonstrate, the sentencing scheme fails even the most minimal rational basis test.

B. Basing a Sentence Upon an Arbitrary Factor Violates a Criminal Defendant's Right to Due Process of Law

1. *The Fifth Amendment to the United States Constitution prohibits the arbitrary exercise of governmental power*

The due process clause is "the least specific and most comprehensive protection of liberties." *Rochin v. California*, 342 U.S. 165, 170 (1952). Due process is an elusive concept,[29] one that "has never been, and perhaps can never be, precisely defined." *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 24 (1981). Due process ultimately "expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque

[29] "Few phrases of the law are so elusive of exact apprehension" as due process of law. *Twining v. New Jersey*, 211 U.S. 78, 99-100 (1908).

as its importance is lofty." *Id.* While not lending itself to a precise definition, "the essential thought can be put by saying that due process has some application whenever men feel a sense of injustice." E. Griswold, *The Fifth Amendment Today* 37 (1955). The "essence of due process" bars Congress "from enactments that shock the sense of fair play." *Galvan v. Press*, 347 U.S. 522, 530 (1954).

Due process, fundamental fairness, and fair play are all concepts without clear boundaries.[30] The roots of due process, however, grow from a belief in "freedom from all substantial arbitrary impositions and purposeless restraints . . . ." *Poe v. Ullman*, 367 U.S. 497, 543 (1967) (Harlan, J., dissenting), *quoted with approval in Moore v. East Cleveland*, 431 U.S. 494, 501-02 (1977) (plurality opinion). The right to be free from arbitrary deprivations of life, liberty, or property is the core value that informs the due process clause.

Whether, and to what extent, due process includes a substantive as well as a procedural component has been the subject of enduring debate. The debate echoes through the pages of the Court of Appeals' decision below. The majority, finding that the petitioners "received ample 'process,'" construed their complaints to be about substance, and concluded that the "judicial invention" of substantive due process did not protect the defendants from the sentences imposed. *Marshall*, 908 F.2d at 1320. The dissent characterized the debate with equal candor:

> It is the disagreement between the severely positivistic view that the content of law is exhausted in clear, explicit, and definite enactments by or under express delegation from legislatures, and the natural

[30] The fact that the scope of the due process clause cannot be clearly defined may be one of its strengths. "In dealing not with the machinery of government but with human rights, [the] absence of formal exactitude, or want of fixity of meaning, is not unusual or even regrettable attribute of constitutional provisions." *Rochin v. California*, 342 U.S. 165, 169 (1952).

> lawyer's or legal pragmatist's view that the practice of interpretation and the general terms of the Constitution (such as "equal protection of the laws") authorize judges to enrich positive law with moral values and practical concerns of civilized society. . . . The positivist view, applied unflinchingly to this case, commands the affirmance of prison sentences that are exceptionally harsh by the standards of the modern Western world, dictated by an accidental, unintended scheme of punishment nevertheless implied by the words (taken one by one) of the relevant enactments. The natural law or pragmatist view leads to a freer interpretation, one influenced by norms of equal treatment . . . .

Marshall, 908 F.2d at 1355 (Posner, J., dissenting).

It is not always easy to separate substance from procedure. Indeed, process can itself be substantive, because fair procedures protect those substantive values, such as respect for individual dignity, that lie at the heart of the Constitution. Because process and substance go hand-in-hand, a focus on process to the exclusion of the ends it protects renders secondary those values that our society regards as primary. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L.J. 1063, 1070-71 (1980).

In this case, as the majority noted, the defendants were accorded the customary procedural protections at sentencing. They had a sentencing hearing, at which they were represented by counsel. They were accorded their right of allocution. They had the opportunity to review and object to their presentence reports. Yet fair procedures may still produce arbitrary results, and it would seem strange to suggest that the Constitution sanctions sentences that are determined by a wholly arbitrary factor, simply because the sentences were the product of an otherwise fair procedure. Arbitrary results are as constitutionally offensive as arbitrary procedures.

Whatever may be said about the wisdom of using substantive due process as a vehicle for importing rights

into the Constitution that are not expressly defined in its text, it has long been recognized that the right to be free from the arbitrary exercise of governmental power is protected both in substance and in procedure by the due process clause. The due process right to be free from arbitrary assertions of governmental power is not a "judicial invention." The phrase "due process" derives from chapter 39 of Magna Carta,[31] but the belief that a governing body is bound by substantive limits can be traced to the medieval acceptance of divine law, and later to the eighteenth century philosophy of natural law. Tribe, *Substantive Due Process of Law*, in 4 L. Levy, ed., *Encyclopedia of the American Constitution* 1797, 1797 (1986).

To the American colonists, due process of law was not merely a guarantee of procedural fairness, but "a protection against arbitrary government in general." R. Mott, *Due Process of Law* 123 (1926). When the Fifth Amendment's due process clause was drafted, the substantive prohibition against governmental arbitrariness was widely understood.[32] *Id.* at 159.

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[31] "The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*." *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856).

While the question has not been settled, many scholars have concluded from the historical evidence that chapter 39 of Magna Carta was intended to protect substantive rights. R. Mott, *Due Process of Law* 36 (1926); R. Pound, *The Development of Constitutional Guarantees of Liberty* 47-48 (1957); F. Strong, *Substantive Due Process of Law: A Dichotomy of Sense and Nonsense* 5, 7 (1986); Riggs, *Substantive Due Process in 1791*, 1990 Wis. L. Rev. 301, 360, 364. Magna Carta embodied "a protest against arbitrary punishment, and against arbitrary infringements of personal liberty and rights of property . . . ." 2 W. Holdsworth, *A History of English Law* 215 (4th ed. 1936, reprinted 1966). Blackstone also suggested that the arbitrary infliction of punishment would violate chapter 39 of Magna Carta. 1 W. Blackstone, *Commentaries* *132.

[32] [T]he idea that the acts of those who wield governmental power must be reasonable, not arbitrary and unreasonable, as

Thus, whatever the limits of substantive due process might be, there is ample support for the proposition that the due process clause prohibits the government from acting arbitrarily in depriving one of life, liberty, or property. A number of commentators adhere to this view.[33] More importantly, Supreme Court decisions have historically recognized that the Constitution protects individuals from the arbitrary actions of government. *See, e.g., Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819) ("the words from the Magna Charta . . . were intended to secure the individual from the arbitrary exercise of the powers of government"); *Hurtado v. California*, 110 U.S. 516, 535-36 (1884) (law "is something more than mere will exerted as an act of power. . . . Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude."); *Giozza v. Tiernan*, 148 U.S. 657, 662 (1893) ("due process of law . . . is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.")

While substantive due process has fallen into disrepute as a vehicle for prohibiting governmental regulation in

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> a legal requirement given effect in the course of ordinary proceedings in the courts, had been taken to be the law of the land or due process of law, and was held firmly by common law lawyers and courts in the seventeenth century.

R. Pound, *The Development of Constitutional Guarantees of Liberty* 103 (1957).

[33] E. Griswold, *The Fifth Amendment Today* 39 (1955) ("the very essence of liberty is the protection of the individual against arbitrary application of the collective power of the state"); L. McGehee, *Due Process of Law Under the Federal Constitution* 60 (1906) (due process restrains arbitrary or capricious action on the part of government which deprives individuals of life, liberty or property); R. Pound, *The Development of Constitutional Guarantees of Liberty* 106 (1957) (due process clause requires that governmental action "is not to be arbitrary and unreasonable").

the areas of economics and social welfare, *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970), it remains a vital check against the unbridled exercise of arbitrary governmental power. E. Corwin, *The Constitution and What It Means Today* 330 (13th rev. ed. 1973). Modern cases continue to recognize the substantive due process right to be free from the arbitrary actions of government. Thus, in the field of land use regulation, the Court will not sustain a governmental restriction if the substantive result "is arbitrary and capricious." *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 676 (1976), citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).[34] Due process also prohibits the government from creating an arbitrary statutory presumption,[35] from arbitrarily excluding individuals from food stamp eligibility,[36] and from inferring arbitrarily that a need exists for high bail in a criminal prosecution.[37]

It is perhaps in the field of criminal justice that the Court must be most vigilant in its effort to assure that no person suffers from arbitrary action inflicted by the government.[38] Liberty, after all, is a "transcending value," *Speiser v. Randall*, 357 U.S. 513, 525 (1958), and the procedural safeguards that protect against arbi-

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[34] "The critical constitutional inquiry . . . is whether the zoning restriction produces arbitrary or capricious results." *Eastlake*, 426 U.S. at 675-76 n.10. *Accord, Moore v. East Cleveland*, 431 U.S. 494, 498 n.6 (1977) (plurality opinion) ("our cases [since *Euclid*] have not departed from the requirement that the government's chosen means must rationally further some legitimate state purpose").

[35] *Leary v. United States*, 395 U.S. 6, 36 (1969); *Tot v. United States*, 319 U.S. 463, 467-68 (1943); *Western & Atlantic Railroad v. Henderson*, 279 U.S. 639, 642 (1929).

[36] *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973).

[37] *Stack v. Boyle*, 342 U.S. 1, 6 (1951).

[38] The principle of due process enjoys its "fullest expression" in the criminal justice process. Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 Harv. L. Rev. 904 (1962).

trary deprivations of liberty must be complemented with a substantive assurance that the results of a criminal proceeding will be fair. Thus, the Court in *Rochin v. California*, 342 U.S. 165, 169 (1952), held that the due process clause requires courts to evaluate the entire course of criminal proceedings to determine whether they offend the canons of decency and fairness that define justice. *Accord, Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (due process and equal protection clauses protect defendants against unequal treatment at all stages of the criminal justice system).

2. *Basing LSD sentences upon the arbitrary weight of an LSD carrier violates due process of law*

The protection against arbitrary action applies at the sentencing stage of a criminal proceeding. In *Gardner v. Florida*, 430 U.S. 349, 358 (1977), the Court stated that "it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *See also Specht v. Patterson*, 386 U.S. 605, 610 (1967); *United States v. Malcolm*, 432 F.2d 809, 815 (2d Cir. 1970) (sentencing process must conform to fundamental principles of liberty); Comment, *Federal Sentencing Guidelines: Due Process Denied*, 33 St. Louis U.L.J. 1049, 1056 (1989) ("Due process under the fifth amendment guarantees a fair and just sentence based on substantial evidence.").

Due process shields against arbitrary or unfair decisionmaking at sentencing by requiring that a sentence not be based on an improper factor. *United States v. Wiley*, 267 F.2d 453 (7th Cir. 1959) (sentencing defendant to a longer term because he exercised his right to trial is improper). By the same token, due process must protect defendants from sentences which are based on an arbitrary factor. A fair and just sentence is one that bears some relationship to the offender's culpability, to the nature of the crime, and to the need to protect society. The weight of an LSD carrier is relevant to none of those

considerations. It is not a factor that should influence a sentence.

Although the carrier's weight effectively determines the sentence imposed, it bears no relationship to any legitimate purpose of sentencing. The purpose of the enhanced penalties under § 841(b)(1) is to punish more severely those retailers who deliver larger quantities of controlled substances. *United States v. Savinovich*, 845 F.2d 834, 839 (9th Cir. 1988); H.R. Rep. No. 845, 99th Cong., 2d Sess. 12 (1986). Basing sentences upon the weight of an LSD carrier does not rationally advance the goal of inflicting harsher punishments upon more significant dealers. Because LSD is sold by the dose, not by weight, and because the weights of carriers vary dramatically, the weight of the LSD carrier is not rationally related to the quantity of LSD distributed. A dose of LSD has the same potency and sells for the same price no matter how heavy or light the carrier might be. A retailer who sells one thousand doses adhered to blotter paper commits the same crime, makes the same profit, and causes the same social harm, as a retailer who sells one thousand identical doses adhered to gelatin capsules. The blotter paper dealer carries no greater moral fault than the gelatin capsule dealer. He cannot distribute to a larger number of consumers or increase his profits by using blotter paper rather than gelatin capsules. If the offenders are identical in all other ways, it is irrational not to sentence them within the same guideline range.

Imposing a longer sentence upon the blotter paper dealer because blotter paper weighs more than gelatin capsules is fundamentally unfair. As Judge Posner noted in dissent, "graduating punishment to the weight of the carrier medium produces, in the case of LSD, a systematically, unavoidably bizarre schedule of punishments that no one is able to justify." *Marshall*, 908 F.2d at 1337 (Posner, J., dissenting). Given that there is no logical nexus between the weight of the drug carrier and the

legislative purpose of punishing major traffickers more severely, the sentencing scheme fails even the least stringent rational basis test.

The majority opinion below suggests that the threat of arbitrary sentencing is theoretical. In fact, the LSD cases mounting up in appellate courts demonstrate that the problem is far from theoretical. Even within the class of defendants who distribute LSD on blotter paper, sentences cannot be administered fairly, because some blotter paper is heavier than others.[39]

Given the interpretation of "mixture or substance" that now prevails, arbitrary results in LSD cases are inevitable. By way of example, one thousand doses of LSD adhered to gelatin capsules in *United States v. McGeehan*, 824 F.2d 677, 680 n.4 (8th Cir. 1987) were less than half the weight of the same number of doses of LSD distributed by petitioners. In *United States v. Johnson*, 888 F.2d 1255, 1256 (8th Cir. 1989), the weight of 4,300 doses of LSD was found, for sentencing purposes, to be 430 milligrams, far less than the weight of the 1,000 doses distributed by the petitioners. Thus, the base offense levels of the defendants in *McGeehan* and *Johnson* would be less than the base offense levels to which the petitioners were subjected, despite the fact that McGeehan distributed the same number of doses of LSD as petitioners while Johnson distributed more than four times as many doses.

Basing sentences upon an arbitrary factor yields arbitrary sentences. Certainly, it must be deemed unconstitutionally arbitrary to deprive judges of any discretionary power to be fair, to *require* courts to sentence equally culpable offenders differently, yet the sentencing scheme at issue does just that. The sentencing scheme is so unsound as to "shock the sense of fair play," *Galvan*, 347 U.S. at 530, and to offend our fundamental

[39] *See* footnote 7, *supra*.

notions of due process. The government cannot be allowed to deprive an individual of liberty for a length of time that is irrationally chosen. "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). This is precisely the kind of arbitrary governmental decision-making that the due process clause prohibits.

3. *Basing a defendant's sentence upon the arbitrary weight of the LSD carrier violates the defendant's right to equal protection of the law*

The Fourteenth Amendment guarantee of equal protection of the law applies by its terms to the states, not to the federal government. The Fifth Amendment right to due process, however, includes an equal protection component. *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

Equal protection requires legislative classifications to be reasonable in light of the legislation's purpose. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). Thus, due process bars a statute that "manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming v. Nestor*, 363 U.S. 603, 611 (1960). *Accord, Reed v. Reed*, 404 U.S. 71 (1971) (arbitrary preference given to men over women for position as estate administrator denies right to equal protection of the law).

Equal protection requires equal treatment of similarly situated persons in the criminal justice system. "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (citation omitted). The due process and equal protection guarantees protect against unequal treatment in all stages

of the criminal justice system. *Id.* at 18. "The right to equality in the criminal justice system includes the right to fair treatment in sentencing." 2 R. Rotunda, J. Nowak, & J. Young, *Treatise on Constitutional Law: Substance and Procedure* § 18.41 at 703 (1986).

The sentencing scheme at issue here creates the "patently arbitrary classification, utterly lacking in rational justification" that *Flemming* warned against. Purveyors of LSD on sugar cubes fall into one classification. Distributors who use gelatin capsules comprise another classification. Blotter paper dealers are still another, as are candy dealers, as are the dealers who sell LSD in its liquid state. Sugar cube dealers receive longer sentences than gelatin capsule dealers for selling an equal number of doses of LSD. Blotter paper dealers get shorter sentences than if they had used sugar cubes, but longer than if they had used gelatin capsules.[40] When they sell the same number of doses, there is no rational reason to treat the members of each category differently. In fact, doing so contravenes the goal of imposing consistent sentences based on culpability shared by the Anti-Drug Abuse Act of 1986 and the Sentencing Reform Act of 1984. Treating equally situated offenders differently —not as a matter of judicial discretion, but as a matter of statutory mandate—is irrational, arbitrary, and a violation of the right to equal protection of the law.

The equal protection violation is apparent in another context. In this case, the weight of the blotter paper was known. The Sentencing Guidelines call for an initial offense level of 28 when the substance containing the LSD weighs between 4 and 7 grams. *Guidelines Manual*, § 2D1.1(c)(8). If the weight of the blotter paper had not been known, the court would have turned

[40] If the Supreme Court affirms the judgment below, one probable impact will be a move toward the use of lighter carriers. Ironically, as lighter carriers tend to be smaller and more easily concealed, this trend will simply make the drug war that much harder to win.

to the "Typical Weight Per Unit (Dose, Pill, or Capsule) Table, "*Guidelines Manual* § 2D1.1, comment. (n. 11). That table reveals that a dose of LSD weighs 0.05 milligram. One thousand doses would therefore weigh 50 milligrams. Delivery of 50 milligrams of a substance containing LSD falls within offense level 14. *Guidelines Manual*, § 2D1.1(c)(15).

An offense level of 28 carries a minimum guideline sentence of 78 months for a category I offender. An offense level of 14 carries a minimum guideline sentence of 15 months for a category I offender. *Guidelines Manual*, § 5A. Thus, because the government was able to ascertain the weight of the carrier, the petitioners were subjected to a penalty that was far more severe than would have been rendered if the government had known only the number of doses sold. Yet it is only the number of doses sold that is relevant to the determination of culpability. The vastly different sentences that can be imposed upon the defendant, depending upon whether the weight of the carrier is known or unknown, highlights the equal protection violation inherent in applying this sentencing scheme to LSD. If the petitioners had been sentenced according to the "Typical Weight Per Unit Table," without regard to the weight of the blotter paper, the Guidelines for each of them would have called for less than a five year sentence. It was irrational and unfair to enhance their sentence based upon the weight of the blotter paper.

It is this irrationality that renders the sentencing scheme unconstitutional as applied to LSD. By subjecting offenders to widely varying sentences based upon an arbitrary factor, the mandatory minimum sentences and the Sentencing Guidelines impose a substantial burden upon the right of defendants convicted of distributing LSD to be treated equally and fairly at sentencing. In order to justify that burden, the government must demonstrate that a substantial and compelling reason per-

mits sentences to be based upon the arbitrary weight of the carrier that holds the LSD. Even if the government is held to a lesser standard, and must show only that a rational reason exists to sentence identically situated offenders differently based on the weight of the LSD carrier, the statute fails, because no such reason exists.

CONCLUSION

Petitioners request that the Court construe 21 U.S.C. § 841(b)(1) and the Sentencing Guidelines to exclude LSD carriers from the phrase "mixture or substance containing" LSD. In the alternative, petitioners ask the Court to declare the statute and the Sentencing Guidelines unconstitutional under the Fifth Amendment to the United States Constitution. Accordingly, petitioners seek reversal of the judgment of the Court of Appeals for the Seventh Circuit and a remand to the district court for resentencing. The district court should be directed to sentence the petitioners in accord with the actual weight of the LSD (apart from the blotter paper) or, if necessary, to estimate that weight by use of the "Typical Weight Per Unit (Dose, Pill, or Capsule) Table" in the *Guidelines Manual*, § 2D1.1, comment. (n. 11).

Respectfully submitted,

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